JAMES MOORMAN
JOHN HOFFMAN
BARRY FISHER
Sierra Club Legal Defense Fund, Inc.
311 California Street, Suite 311
San Francisco, CA 94104
Telephone: (415) 398-1411

FELDMAN, WALDMAN & KLINE
LELAND R. SELNA, JR.
2700 Russ Building
San Francisco, CA 94104
Telephone: (415) 981-1300

Attorneys for Plaintiff SIERRA CLUB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, Plaintiff, v. ROGERS C. B. MORTON, et al., Defendants.	Civil Action No. 51464 WTS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND COMPLAINT

2023.009.0197 a

TABLE OF CONTENTS

		Page
INTRODUCTORY STATEMENT		1
I	THE SIERRA CLUB'S ALLEGATIONS IN AMENDED PARAGRAPH 3 OF ITS COMPLAINT COMPLY WITH THE SUPREME COURT'S TEST FOR STANDING TO SUE.	2
II	SIERRA CLUB'S THIRD CLAIM FOR RELIEF ALLEGES MATTERS ARISING SINCE THE APPEAL OF THE PRELIMINARY INJUNCTION.	9
	A. General Background on NEPA	10
	B. The Defendants are Required by NEPA to Protect the Environment from the Type of Damage the Disney Development will Cause at Mineral King.	13
	C. The Disney Development Constitutes "Major Federal Actions Significantly Affecting the Quality of the Human Environment" Within the Meaning of Section 102 (2)(C) of NEPA Requiring an Environmental Impact Statement.	15a
III	THE SIERRA CLUB MEETS THE REQUIREMENTS OF RULE 15(a), FEDERAL RULES OF CIVIL PROCEDURE.	17
CONCLUSION		21

2023.009.0197 b

INDEX OF AUTHORITIES

Statutes, Regulations and Court Rules	Page
5 U.S.C. §702 (Administrative Procedure Act, §10)	4
28 U.S.C. §1653	18
42 U.S.C. §4321 et seq. (National Environmental Policy Act)	2,9,10, 11,13,14 15,16,19
37 Fed. Reg. 6327	17
37 Fed. Reg. 6876	17
37 Fed. Reg. 4110	17
37 Fed. Reg. 1082	17
36 Fed. Reg. 7724, ¶2	13
36 Fed. Reg. 23669	16
Federal Rules of Civil Procedure	
Rule 15	2,3
Rule 15(a) F.R.Civ.P.	17,19
Rule 20, F.R.Civ.P.	20
Forest Service Manual, §1941	17
Forest Service Manual, §1942.22	16
Cases	
Anglo Canadian Shipping Co. v. U.S., 238 F.2d 18 (9th Cir., 1956)	19
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150	4,5
Barlow v. Collins, 397 U.S. 157	4
Breres v. Northern California Prop. Ass'n., 316 F.2d 787, 789-790 (9th Cir., 1963)	18
Brooks v. Volpe, ___ F.2d ___, 3 ERC 1859 (9th Cir., 1972)	9
Calvert Cliffs Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir., 1971)	10,11,15
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402	3
Crowther v. Seaborg, 312, F.Supp. 1205, 1212	6

2028.009.0197c

INDEX OF AUTHORITIES
(Continued)

Cases	Page
EDF v. TVA, ___Fed. Supp.___ 3ERC 1553 (E.D. Tenn., 1972)	11
Eklund v. Mora, 410 F.2d 731, 732 (5th Cir., 1969)	19
Ely v. Velde, 451 F.2d 1130, 1ELR 20612 (4th Cir., 1971)	10
Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097	6
Facus v. Texas Instruments, Inc., 429 F.2d 849, 851 (1st Cir., 1970)	18, 19
Finn v. American Fire and Casualty Co., 207 F.2d 113 (5th Cir., 1953)	20
Foman v. Davis, 371, U.S. 178, 182, 9 L.ed 2d 222 (1962)	18, 19
Green County Planning Commission v. FPC, ___F.2d___, 2 ELR 20017 (2nd Cir., 1972)	10, 11
Hockner v. Guaranty Trust Co., 117 F.2d 95, 98 (2d Cir., 1941)	20
Kalur v. Resor, 225 F. Supp. 1, 3 ERC 1458 (D.D.C., 1971)	11
Lathan v. Volpe, ___F. 2d___, 1 ELR 20602; 2 ELR 20090 (9th Cir., 1971)	9
Lemmon v. Cedar Point, Inc., 406 F.2d 94, 95 note 2 (6th Cir., 1969)	19
Martin v. Ethyl Corp., 341 F.2d 1, 4 (5th Cir., 1965)	18
Maty v. Grassel Chemical Co., 303 U.S. 197, 200-201 (1938)	18
Maynard, Merel & Company v. Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 273 [1970])	19
Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir., 1968)	18, 19
Nagler v. Admiral Corporation, 248 F.2d. 319, 322 (2d Cir., 1957)	18
National Helium Corporation v. Morton, ___F.2d___, 1 ELR 20478 (10th Cir., 1971)	10
Nolop v. Volpe, 333 F.Supp. 1364, 3 ERC 1339 (D.S.Dak., 1971)	17

2023.009.0197d

INDEX OF AUTHORITIES
(Continued)

Cases	Page
Northwest Orient Airlines v. Gorter, 254 F.2d 652 (9th Cir., 1958)	18
Office of Communication of the United Church of Christ v. FCC, 359, F.2d 994, 1005	6
Reade v. Ewing, 205 F.2d 630, 631-632	6
Rosenberg Bros. & Co., Inc. v. Arnold, 283 F.2d 406 (9th Cir., 1960)	18
Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 615-616	6
Smith v. Guaranty Service Corp., 51 F.R.D. 289 (N.D. Cal., 1970)	19
Stenhouse v. Jacobsen, 193 F.Supp. 694 (N.D. Cal., 1961)	19
Stern v. Beer, 200 F.2d 794, 795 (6th Cir., 1952)	19
Travelers Indemnity Co. v. U.S., 382 F.2d 103 (10th Cir., 1967)	19
U.S. v. Hougham, 364 U.S. 310, 317 (1960)	18
Wilson v. United States, 246 F. Supp. 613 (N.D. Cal., 1965)	18

2023.009.0977

JAMES MOORMAN
JOHN HOFFMAN
BARRY FISHER
Sierra Club Legal Defense Fund, Inc.
311 California Street, Suite 311
San Francisco, CA 94104
Telephone: (415) 398-1411

FELDMAN, WALDMAN & KLINE
LELAND R. SELNA, JR.
2700 Russ Building
San Francisco, CA 94104
Telephone: (415) 981-1300

Attorneys for Plaintiff SIERRA CLUB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, Plaintiff, v. ROGERS C. B. MORTON, et al., Defendants.	Civil Action No. 51464 WTS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND COMPLAINT

This Court issued a preliminary injunction against the defendants on August 4, 1969, prohibiting the issuance of permits, rights-of-way, or approvals for Walt Disney Productions proposed ski development in Sequoia National Game Refuge and Sequoia National Park. On September 16, 1970, the United States Court of Appeals for the Ninth Circuit vacated the preliminary injunction on the grounds (1) that the Club had not alleged "a sufficient interest for standing to be conferred" and (2), with regard to the merits, that the Club had not shown with the required degree of certainty that its action would succeed. On April 19, 1972, the United States Supreme Court affirmed the Ninth Circuit on the sole ground that the Sierra Club had not alleged a sufficient interest in its Complaint to maintain its standing. The Court specifically stated that ". . . we do not reach any other questions presented, and we intimate no views on

2023.009.0197 f

the merits of the Complaint." (Slip. Op. 14). The Court specifically stated:

> "Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure." (Slip. Op. 8, n.8)

Plaintiff, therefore, in accordance with the Supreme Court's suggestion, moves to amend its complaint to allege its interest in Mineral King in accordance with the tests set forth in the Court's opinion. Plaintiff also moves to add as parties plaintiff certain individuals who could have joined in the original complaint. In addition, since defendants appealed this Court's preliminary injunction, the National Environmental Policy Act, 42 U.S.C. §4321 et seq., has become the law of the land. That Act imposes duties upon defendants with regard to the subject matter of this suit which have not been fulfilled. For that reason, plaintiff moves to add a Third Claim for Relief under the National Environmental Policy Act and to amend its Prayer.

I

THE SIERRA CLUB'S ALLEGATIONS IN AMENDED PARAGRAPH 3 OF ITS COMPLAINT COMPLY WITH THE SUPREME COURT'S TEST FOR STANDING TO SUE.

The original allegations in Paragraph 3 of the Sierra Club's complaint were held by the Supreme Court to state insufficient facts upon which to base standing.[1/]

[1/] Paragraph 3 read as follows:

> "Plaintiff SIERRA CLUB is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California, since 1982. Membership of the Club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay Area. For many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation

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2023.009.0197 g

The Sierra Club now comes forward with an amendment which alleges its substantial interest in Mineral King. Before spelling out the details of the Club's proposed amendment, however, it is well to observe that the Supreme Court set forth an example of a proper standing allegation. Thus, the Court said:

> "No question of standing was raised in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402. The complaint in that case alleged that the organizational plaintiff represented members who were 'residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area.'" (Slip. Op. 7, n.7)

Secondly, in footnote 8, the Court said, in part:

> "In an amici curiae brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, infra. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure." (Slip. Op. 8, n.8)

In holding that the Sierra Club had made an insufficient allegation of its interest to support standing, the Supreme Court went to pains to explain the proper grounds for standing.

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1 cont'd./ and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the SIERRA CLUB is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

2023.009,0197 h

To begin with, the Court noted that the Sierra Club relied on §10 of the Administrative Procedure Act (APA), 80 Stat. 392, 5 U.S.C. §702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (Slip. Op. 5)

Although early decisions on standing under this provision had required a party to have a "legal interest" and a "legal wrong," the Court observed that it had "held more broadly that persons had standing to obtain judicial review of federal agency action under §10 of the APA where [1] they had alleged that the challenged action had caused them 'injury in fact,' and [2] the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated" (Slip. Op. 6) citing Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 and Barlow v. Collins, 397 U.S. 157.[2]/ Then the Court stated:

> ". . . neither Data Processing nor Barlow addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared. That question is presented in this case." (Slip. Op. 6, 7) (Emphasis added)

It is crystal clear from the Court's opinion in answering the questions presented that noneconomic interests can be the basis of standing. Secondly, it is clear that those noneconomic interests include the cluster of interests brought forward by the Sierra Club in this case: recreational use,

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2/ The Court noted then (Slip.Op. 6, n.5) that it did not reach any questions concerning the second or "zone of interests" test or its applications to the facts. Thus, the opinion dealt solely with the "injury in fact" test.

2023.009.0197 i

aesthetics, ecology, environment, and conservation. Thirdly, the Court held that the Sierra Club had alleged sufficient injury to such interests to lay the basis of standing. The Club only failed to allege facts that showed that the interests and injuries alleged were the Club's own interests and injuries. In the words of the Court:

> "The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetic and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development 'would destroy or otherwise affect the scenery, natural and historic objects and wildlife of the Park and would impair the enjoyment of the park for future generations.' We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under §10 of the APA. Aesthetics and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires . . . that the party seeking review be himself among the injured." (Slip. Op. 7)(Emphasis added.) 3/

Thus, the sole failing in its complaint was that "The Sierra Club failed to allege that it or its members would be

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3/The Court also stated:

> "The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and towards discarding the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review.[13] We noted this development with approval in Data Processing, supra, at page 154, in saying that the interest alleged to have been injured 'may reflect "aesthetic, conservational, and recreational" as well as economic values.' But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself

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2023.009.0197

affected in any of their activities or pastimes by the Disney development." (Slip.Op.8)

Pursuant to the suggestion of the Supreme Court that Sierra Club could amend its complaint (Slip. Op. 8, n.8) the Club has reexamined its interests in and historic use of the Mineral King area. In a word, the Club by the proposed amendment is alleging that it, its Chapters and its members regularly conduct outings in and around the Mineral King area, that they have done so on a regular basis since the turn of the century and that their activities are substantial. The Club also alleges that many of its members undertake outings in and around the valley which consist of hiking, picnicking, photography, camping, etc., and that some of its members even own or rent cabins in the valley which are used for vacations, retreats or summer residences. The Club further alleges that it has, over the years, conducted and continues to conduct campaigns to have the Mineral King area included in the Sequoia National Park. Lastly, the Sierra Club continues and reaffirms its allegations, approved by the Supreme Court (Slip. Op. 7) that Walt Disney's proposed development would "destroy or otherwise affect the scenery, natural and historic objects and wildlife of the park and would impair

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3 cont'd./ suffered an injury." (Slip. Op. 11)

"[13]See, e.g., Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097 (interest in Health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Office of Communication of the United Church of Christ v. FCC, 359, F.2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 615-616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); Reade v. Ewing, 205 F.2d 630, 631-632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); Crowther v. Seaborg, 312 F.Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast). (Slip.Op. 11, n.13)

2023,009,0197 K

the enjoyment of the park for future generations."

The Club's former theory of its standing, as embodied in its Complaint, has obviously been rejected by the Supreme Court. Thus, the Sierra Club had erroneously thought that the injury to its noneconomic interests was not the key, but that its longstanding concern and expertise in such matters were sufficient to give it standing as a "representative of the public." (Slip.Op. 9) The Sierra Club, however, as shown above, does have an interest it can allege in conformity with the Supreme Court's decision and need not and does not attempt to stand on its former allegations.

The Club's new allegation of its standing reads in full as follows:

> Plaintiff Sierra Club is a non-profit corporation organized and operating since 1892 under the laws of the State of California. Its principal office is in San Francisco, California. The membership of the Club is approximately 140,000 nationally. Of this number, approximately 82,000 members live in California. The largest centers of membership are the San Francisco Bay area and the Los Angeles area. Additionally, the Club has chapters with substantial memberships throughout the San Joaquin Valley.
>
> The Sierra Club has conducted outings over the years on a regular basis in the Sierra Nevada. In addition, the Sierra Club has carried on a program to acquaint people with the values of the Sierra and to preserve it in National Parks and National Forest Wilderness Areas. In carrying out this program, Sierra Club has conducted, and continues to conduct, substantial activities in and around the Mineral King area. In addition, several of the Club's chapters have conducted and continue to conduct outings in and around Mineral King on a regular basis. In addition, many of the Club's members individually or in informal groups undertake hikes and other trail outings in and around the Mineral King valley and engage in various outdoor recreational activities in and around the valley such as picnicking, hiking, climbing, photography, camping, and family outings. A few of the Club's members own or lease small cabins in the Mineral King area which they use as retreats during the summer season.
>
> The aesthetic, environmental, and recreational interests of the Club, its chapters and its members in the Mineral King area,

2023.009.0197 1

including their enjoyment of the scenery, natural and historic objects and wildlife, would be injured by the conversion of the area into a commercial ski development. Use of the valley itself for their activities would be pre-empted. Development, furthermore, will impair the use and enjoyment of Mineral King as a beginning point for wilderness outings. In addition, with commercial chair and gondola lifts built up the mountainsides, the high country around Mineral King will be overloaded, depriving the Club, its chapters and its members of the wilderness experiences they have enjoyed since the turn of the century.

In addition, the Sierra Club has spent and continues to spend substantial time and effort in the conservation of Mineral King and the protection of the ecology of Mineral King and its environs. Over the years the Club has engaged in various campaigns to extend the boundaries of Sequoia National Park to include Mineral King. The early phase of this campaign culminated in 1926 with a compromise Act of Congress designating the area the Sequoia National Game Refuge, 53 Stat. 1431, 16 U.S.C. §688. The Club continues to seek to have the area added to the National Park. Mass development would obviously destroy the park qualities of the area and, in so doing, destroy the Club's conservational, environmental, and ecological interests in Mineral King. Thus, the ski development would destroy the scenic, natural wildlife and historic aspects of the Mineral King area.

2023.009.0197 m

II

SIERRA CLUB'S THIRD CLAIM FOR RELIEF ALLEGES MATTERS ARISING SINCE THE APPEAL OF THE PRELIMINARY INJUNCTION.

The defendants appealed this Court's preliminary injunction on September 19, 1969. On January 1, 1970, the National Environmental Policy Act, 42 U.S.C. §4321 et seq., (hereinafter referred to as "NEPA") became law. NEPA now applies to this project which, as a result, cannot go forward. Plaintiff believes the defendants concede that NEPA applies to the project in some degree, but do not agree that the project is illegal under NEPA and cannot be built at all.

In summary, no permit, approval or right-of-way can be granted for any part of the Disney project either in the Game Refuge or the National Park unless and until, among other things:

1) An environmental impact study has been prepared and made available to the President, the Council on Environmental Quality and the public and accompanied the proposal through the defendants' review process;

2) An independent study of alternatives has been prepared;

3) An environmental cost benefit analysis has been prepared demonstrating the benefit outweighs the harm of this project. This latter requirement cannot be fulfilled with regard to this project.

Violations of NEPA can legally form the basis for a claim for relief and there are now many cases in the reports concerning such claims. See, e.g., Brooks v. Volpe, _____ F.2d_____, 3 ERC 1859 (9th Cir., 1972); Lathan v. Volpe, _____

2'23.009.0197 n

F.2d_____, 1 ELR 20602; 2 ELR 20090 (9th Cir., 1971); Calvert Cliffs Coordinating Council v. AEC, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir., 19__); Ely v. Velde, 451 F.2d 1130, 1 ELR 20612 (4th Cir., 1971); National Helium Corporation v. Morton, ____F.2d ____, 1 ELR 20478 (10th Cir., 1971); Green County Planning Commission v. FPC, ____F.2d_____, 2 ELR 20017 (2nd Cir., 1972).

A. General Background on NEPA.

The leading case interpreting NEPA is Calvert Cliffs Coordinating Committee, Inc. v. AEC, supra. As stated in that case, NEPA is the broadest and most important of several recently enacted statutes attesting "to the commitment of the government to control, at long last, the destructive engine of material 'progress'." The Court of Appeals also noted that:

> "NEPA . . . is cast in terms of a general mandate and broad delegation. . . .to new and old administrative agencies. It takes the major step of requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it prescribes certain procedural measures to ensure that those values are in fact fully respected." 449 F.2d at 1111.

The relevant portion of NEPA is Title 1. Section 101(a)(42 U.S.C. 4331 (a)), sets forth the Act's basic substantive policy: That the federal government "use all practicable means and measures" to protect the environmental values. In Section 101(b), (42 U.S.C. 4331(b)), imposing an explicit duty on federal officials, the Act provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to avoid environmental degradation and promote "the widest range of beneficial uses of the environment without . . . undesirable and unintended consequences." As noted in Calvert Cliffs, supra at 1112, NEPA's procedural requirements, "which are designed to see that all federal agencies do in fact exercise the substantive

2023.004.01970

discretion given them, . . . are not highly flexible. Indeed, they establish a strict standard of compliance." See Green County v. FPC, supra.

NEPA procedures first compel all agencies to use a "systematic, interdisciplinary approach" to environmental planning and evaluation "in decision making which may have an impact on man's environment." In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." 42 U.S.C. §4332(2)(A),(B).

> "'Environmental amenities' will often be in conflict with 'economic and technical considerations'. To 'consider' the former along with the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systemic' balancing analysis in each instance." Calvert Cliffs, supra at 1113.

The most litigated of NEPA's sections is Section 102(2)(C). It requires that responsible officials of all federal agencies prepare a detailed environmental impact statement covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the cost-benefit equation. The purpose of the "detailed statement" is to aid in the agencies' own decision-making process and to advise other interested agencies and the public of the environmental consequences of planned federal action. Calvert Cliffs, supra at 1114. See EDF v. TVA, _____ Fed. Supp. _____, 3 ERC 1553 (E.D.Tenn. 1972); Kalur v. Resor, 335 F. Supp. 1, 3 ERC 1458 (D.D.C. 1971). As the Court noted in EDF v. TVA, the cost-benefit analysis must be set out in the environ-

2.23.009.0197 P

mental impact statement in detail so that a non-expert reader may evaluate the merits of the conclusion and assess the thoroughness of the agency's research.

Section 102(2)(D) of the NEPA requires all federal agencies specifically to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §4332(2)(D). This requirement is similar to that of the Section 102(2)(C) statement in that it also "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made." Calvert Cliffs, supra at 1114. 4/

Two months after he signed NEPA into law, the President issued Executive Order 11514, 35 Fed. Reg. 4247 (March 5, 1970), 5/ requiring implementation of the Act by all Federal Agencies.

Title II of NEPA Creates in the Executive Office of the President the Council on Environmental Quality (the CEQ), 42 U.S.C. §4342. The CEQ's duties include reviewing and appraising the programs and activities of federal agencies in light of the policies and requirements set forth in Title I of the Act discussed above. The CEQ's Guidelines for implementation of NEPA (36 Fed. Reg 7724) amplify and clarify the mandate of Section 102(2)(C) and Executive Order 11514 and further

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4/The extensive examination of alternatives required is most thoroughly treated in NRDC v. Morton, ____F.Supp._____, 3 ERC 1473 _____, affirmed _____F.2d_____, 3 ERC 1558 (D.C. Cir., 1972).

5/This Executive Order is set forth at 42 U.S.C. §4321 (Pocket Part 1971).

2023.009.0197 8

emphasize the importance to be attached to environmental impact statements. For example, the guidelines assert that "[t]he objective of Section 102(2)(C) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action and to assist agencies in implementing not only the letter, but the spirit, of the Act." 36 Fed. Reg. 7724, ¶1 (Empahsis added). The guidelines further require that "[a]s early as possible . . . Federal agencies will . . . assess in detail the potential environmental impact (of major action) in order that adverse effects are avoided, and environmental quality is restored or enhanced, to the fullest extent practicable." 36 Fed. Reg. 7724, para. 2.

B. The Defendants are Required by NEPA to Protect the Environment from the Type of Damage the Disney Development will Cause at Mineral King.

NEPA places a substantive duty on the defendants to protect and enhance the environment. This duty is to be fulfilled by balancing the harm of their projects against the social utility thereof. In the case at hand a wildlife refuge is to be turned over to a private developer for exploitation. The situation is thus one in which nothing appears which may justifiably be weighed against the injury to the public refuge.

Section 102(1) of NEPA sets forth defendants' basic obligation to protect the environment. That section states:

> "The Congress authorizes and directs that to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . . ."

The "policies set forth in this Act" are those of Section 101(b), which begins:

> "It is the continuing responsibility of

2023.009.0197 r

> the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may . . . .
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. (42 U.S.C. 4331(b))."

Thus, Section 101(b) lists six specific objectives to be achieved in balance with the "other essential considerations of national policy." These objectives are standards under which "the policies, regulations and public laws of the United States," including those of the defendants, are directed to be administered "to the fullest extent possible." Section 102(1). They include such "plain and explicit" directives as those to "attain the widest range of beneficial uses of the environment," to "preserve important historic, cultural, and natural aspects of our national heritage," and "to approach the maximum attainable recycling of depletable resources."

In carrying out these policy directives of NEPA, government officials are required to undertake a rigorous balancing of costs and benefits. Thus we find that agencies are to "attain the widest range of beneficial uses . . . <u>without</u>. . . <u>undesirable and unintended consequences</u>," to "maintain, <u>wherever possible</u>, an environment which supports diversity and variety of individual choice," to "approach the <u>maximum attainable</u>

2023.009.0197 S

recycling of depletable resources, and to "use all practicable means, consistent with other essential considerations of national policy." (Emphasis added.)

The theme of balance embodied in NEPA was emphasized by the District of Columbia Circuit in Calvert Cliffs Coordinating Committee, Inc. v. AEC, supra. The Court observed:

> "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations." 449 F.2d at 1112 (Emphasis added.)

Furthermore, on May 16, of this year, the General Counsel of the President's Council on Environmental Quality, established by Title II of NEPA for the very purpose of overseeing and guiding the implementation of NEPA, confirmed the Calvert Cliffs interpretation of NEPA in the following words:

> 2. Duty to "Balance" Advantages and Disadvantages of the Proposed Action.
>
> Inherent in the duty imposed on any agency by NEPA to promote environmental quality is the obligation to weigh the possible environmental effects of a proposal against the effects on other public values the agency is mandated to consider. If the environmental effects are adverse, the agency must consider whether they outweigh the benefits of the proposal in deciding whether to go ahead. This implicit requirement is confirmed by the directive of Section 102(2)(B) that agencies develop methods for giving "presently unquantified environmental amenities and values . . . appropriate consideration in decisionmaking along with economic and technical considerations.". . . Recommendations for Improving Agency NEPA Procedures, BNA Env.Rptr., Current Developments, May 19, 1972, p. 83.

In sum, the policies to which Section 102(1) directs federal programs to conform are set out as standards in Section 101(b). Section 101(b) prescribes a mechanism to implement these standards through balancing environmental effects with efforts deemed beneficial by "other considerations of national policy."

In the case at hand a public Game Refuge is to be

2023.009.6197+

turned over to a private developer, the natural, scenic and wildlife values of that refuge impaired, a national park subverted for the developer's access and a far larger area of surrounding public lands endangered by the development's commercial facilities. So far, nothing has appeared which could possibly justify or balance this outrageous conduct on the part of the defendants.

C. The Disney Development Constitutes "Major Federal Actions Significantly Affecting the Quality of the Human Environment" Within the Meaning of Section 102(2)(C) of NEPA Requiring an Environmental Impact Statement.

The use of thousands of acres of Sequoia National Game Refuge land to facilitate a major ski development, together with major access developments through Sequoia National Park is precisely the kind of Federal action to which the National Environmental Policy Act is directed. There can be no doubt whatsoever that the construction of ski runs and ski lifts, access highways or railroads, service stations, lodges, water facilities and electrical transmission lines, a sewage treatment station, and other developmental activities necessary to implement the Disney Development will likely cause major disruptions to the Mineral King and Sequoia National Park environments.

2023.009.0197 u

Section 102(2)(C) mandates that a detailed statement on the environmental impact of proposed action must be prepared with respect to "major federal actions significantly affecting the quality of the human environment." And, while there have been representations by one of the defendants that an impact statement will be forthcoming, it is appropriate to set forth the details as to defendants' own regulations.

Seventeen months after NEPA was enacted, the Forest Service promulgated its own implementing regulation. Forest Service Manual Chapter 1940 entitled "Environmental Statements". These regulations specify NEPA's application to the issuance of permits for ski developments. Section 1941.22 of the Forest Service Manual (FSM) states that "Environmental Statements will be prepared on major proposed plans, programs, and major projects . . . supported in whole or in part through land use permits." FSM Section 1941.22-2(f) provides that the preparation and filing of an Environmental Statement should be considered for major public service developments <u>such as "winter sports sites and resorts</u>." 36 Fed. Reg. 23669. (Emphasis added.)

Defendants have already recognized NEPA's application to the issuance of permits for ski resorts. In January 1972 a Draft Environmental Impact Statement was filed with respect to proposed permits for the Mt. Bailey Winter Sports Development

2023.009.0197 ✓

in Oregon (37 Fed. Reg. 1082, January 22, 1972). That complex is smaller in size than the proposed Disney development. In addition, a Draft Statement was also filed by the Forest Service for a major winter sports development at Pelican Butte, Oregon (37 Fed. Reg. 6327, March 28, 1972). The Forest Service has even recognized that the addition of a single chairlift to an existing ski development is a major federal action requiring the filing of an Environmental Impact Statement (Draft NEPA Statement for Mount Ashland Chairlift No. 2, Rogue River National Forest, 37 Fed. Reg. 6876, April 5, 1972). Certainly, the major ski resort the Court is here concerned with will have at least as much environmental impact as the 2.6-mile Pack River Company Road within the Washington's Wenatchee National Forest, a project to which the Forest Service has recognized that NEPA applied (See Forest Service Notice of Draft Environmental Impact Statement, 37 Fed. Reg. 4110, February 26, 1972). That road will consume only 42 acres of undeveloped land and cost only $143,000.

Finally, Section 1941 of the Forest Service's regulation and paragraph 5b of the CEQ Guidelines require the filing of an Environmental Statement when there is potential that the environmental impact is highly controversial. The controversy in the instant case is a matter of wide public knowledge. Indeed, the very existence of the lawsuit demonstrates that controversy exists. See, Nolop v. Volpe, 333 F.Supp. 1364, 3 ERC 1339 (D.S.Dak, 1971), at 1341.

III

THE SIERRA CLUB MEETS THE REQUIREMENTS OF RULE 15(a), FEDERAL RULES OF CIVIL PROCEDURE.

Rule 15(a), F.R.Civ.P., provides, in part, that:

"a party may amend his pleading only by leave of Court or by written consent of the

2023.009.0197 W

adverse party; and leave shall be freely given when justice so requires."

The Supreme Court has reiterated that, in the absence of some overriding reason, the rule means exactly what it says and that amendments should be freely given, Foman v. Davis, 371, U.S. 178, 182, 9 L.ed 2d 222 (1962). Accord, e.g., U.S. v. Hougham, 364 U.S. 310, 317 (1960); Maty v. Grassel Chemical Co., 303 U.S. 197, 200-201 (1938); Nagler v. Admiral Corporation, 248 F.2d 319, 322 (2d Cir., 1957); Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir., 1968); Facus v. Texas Instruments, Inc., 429 F.2d 849, 851 (1st Cir., 1970).

The Ninth Circuit has stated that amendments are to be granted with "extreme liberality." Rosenberg Bros. & Co., Inc. v. Arnold, 283 F.2d 406 (9th Cir., 1960). Also see Northwest Orient Airlines v. Gorter, 254 F.2d 652 (9th Cir., 1958); and Breres v. Northern California Prop. Ass'n., 316 F.2d 787, 789-790 (9th Cir., 1963). As this Court said in Wilson v. United States, 246 F.Supp. 613 (N.D. Cal., 1965):

> "Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the merits, the courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed." 246 F.Supp. at 619.

This rule specifically applies when jurisdiction has been found to be lacking. 28 U.S.C. §1653 provides that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" and the Courts have held that this section should be liberally construed. In the case of Martin v. Ethyl Corp., 341 F.2d 1, 4 (5th Cir., 1965) the Court said:

> "Appellant has alleged sufficient standing to invoke the jurisdiction of the Court under Section 301; and we think that

2023.009.0197 X

> the Court below abused its discretion in not allowing appellant to amend. Rule 15(a), Federal Rules of Civil Procedure dictates that leave to amend 'shall be freely given when justice so requires.'" [continuing to quote Foman v. Davis, supra].

See also Stern v. Beer, 200 F.2d 794, 795 (6th Cir., 1952); Lemmon v. Cedar Point, Inc., 406 F.2d 94, 95, note 2 (6th Cir., 1969); Eklund v. Mora, 410 F.2d 731, 732 (5th Cir., 1969)(amendment after judgment). Also see Stenhouse v. Jacobsen, 193 F.Supp. 694 (N.D.Cal. 1961).

It is clear that there is no good reason to deny the amendments proposed by Sierra Club. While time has passed, the delay was not caused by the plaintiff, but because defendants appealed this Court's preliminary injunction. Furthermore, it appears that Disney and defendants are still not prepared to proceed. In any event, a three-year delay alone without bad faith or prejudice is insufficient grounds to deny amendment. Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra; Fachus v. Texas Instruments, Inc., supra. The plaintiff is clearly not guilty of bad faith, nor will the amendment cause the defendant any undue prejudice.

With regard to the proposed Third Claim for Relief, the NEPA was enacted only after the appeal was taken in this case and this is the first opportunity of the Sierra Club to add these allegations. As the allegations deal with the same subject matter as the other claims, the amendment is appropriate.

As for the additional parties plaintiff proposes to add to the complaint, such addition is proper under Rule 15(a). Anglo Canadian Shipping Co. v. U.S., 238 F.2d 18 (9th Cir., 1956); Travelers Indemnity Co. v. U.S., 382 F.2d 103 (10th Cir., 1967); Smith v. Guaranty Service Corp., 51 F.R.D. 289 (N.D.Cal. 1970). Leave to amend to add new parties plaintiff is granted where, as here, their claims arise out of the same transactions, they could have joined originally in bringing suit and do not prejudice defendant by their addition. Maynard, Merel & Company v.

2023.009.0197 y

Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 273 [1970]).

In this case the joinder is clearly proper. The new plaintiffs' claims all arise out of the same transaction as Sierra Club's: the proposed development of Mineral King as a ski development. Furthermore, they could have joined in the original complaint, clearly meeting the test for permissive joinder found in Rule 20, F.R.Civ.P., that:

> "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Lastly, it is hard to see how their addition can prejudice the defendant.

All of the new plaintiffs are people who have used and continue to use Mineral King extensively as a residence and/or as a center of their recreational activities. While the new plaintiffs and the Sierra Club all believe the Sierra Club's proposed amended Paragraph 3 of the complaint is sufficient for purposes of standing, they seek to join as plaintiffs to ensure beyond a shadow of a doubt that this case, of overwhelming importance to them, will not suffer for lack of an appropriate party plaintiff. In this regard, it is proper for the plaintiff to correct jurisdictional defects by adding parties. Hockner v. Guaranty Trust Co., 117 F.2d 95, 98 (2d Cir., 1941); Finn v. American Fire and Casualty Co., 207 F.2d 113 (5th Cir., 1953).

2023.009.0197 2

CONCLUSION

For all the reasons set forth above, this Court should allow plaintiff Sierra Club to amend its Complaint as set forth in its Motion to Amend of June 2, 1972.

DATED:

June 2, 1972

JAMES MOORMAN
JOHN D. HOFFMAN
BARRY FISHER
LELAND R. SELNA, JR.

By: James Moorman
James Moorman

Attorneys for Plaintiff SIERRA CLUB
And Proposed Additional Plaintiffs

ROBERT W. JASPERSON
GREGORY ARCHBALD

Of Counsel

2023.009.0197 aa